SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, 1974
No. 74-262

ELIZABETH RICCI,

*Petitioner,*

*vs.*

COUNTY OF RIVERSIDE; R. C. SMITH, Director, Department of Building and Safety for the County of Riverside; WILLIAM O. ALLEE, General Building Inspector for the County of Riverside,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

## BRIEF FOR RESPONDENTS.

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*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

## BRIEF FOR RESPONDENTS.

### Opinions Below.

This action was consolidated on appeal with two other cases.[1] The opinion of the United States Court of Appeals for the Ninth Circuit and dissenting opinion were filed on March 18, 1974 and are reported at 495 F.2d 1 (9th Cir. 1974). Petition for rehearing and suggestion for rehearing en banc was denied June 11,

[1] *Rincon Band of Mission Indians v. County of San Diego,* 324 F. Supp. 371 (S.D. Cal. 1971), *petition for cert. filed,* 43 U.S.L. Week. 3018 (U.S. July 15, 1974) (No. 73-2023); *Madrigal v. County of Riverside,* Civil No. 70-1893, C.D. Cal., Feb. 16, 1971.

1974. A copy of the order denying the petition is attached to Petitioner's brief and marked Appendix C. The opinion of the United States District Court, Central District of California, was filed August 3, 1971, and is unreported.[2] A copy of the opinion is attached hereto and marked Appendix A.

**Jurisdiction.**

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), and Rule 22 of the Rules of the Supreme Court of the United States. The order of the Court of Appeals for the Ninth Circuit denying the petition for rehearing was filed June 11, 1974, and the petition for certiorari was filed within 90 days of that date.

**Questions Presented.**

1. Is an appeal moot where the trial court restrains enforcement of a portion of an ordinance and no attempt is made to enforce the remaining provisions of the ordinance pending appeal?

2. Did the District Court have jurisdiction to hear the action?

**Statutes Involved.**

The relevant statutes and ordinances are set forth in Petitioner's brief and marked Appendix D. They are the following:

28 U.S.C. §1331;

28 U.S.C. §2201;

Riverside County, California, Ordinance No. 457, §4.

---

[2]The action was consolidated for trial with *United States v. County of Riverside*, Civil No. 71-1297, C.D. Cal., Sept. 9, 1971, *appeal dismissed*, Dec. 29, 1971.

**Statement of the Case.**

This is an action brought by an Indian Allottee for injunctive and declaratory relief to prevent the enforcement of the Building Code of Riverside County (Ordinance No. 457) against her partially constructed dwelling located on Indian land held in trust by the United States of America.[3]

An action filed by the United States raising similar issues was consolidated for trial with this action. [Docket, Clerk's Record (R) 414; Reporter's Transcript (T) 81, line 21, to T. 82, line 1.] By prior stipulation of all parties to both actions, testimonial evidence was offered only by affidavit. [T. 82, lines 8-18.]

In February, 1971, Petitioner and her husband began construction of a house on her Indian allotment of land located within the Pechanga Indian Reservation. [Stipulation,[4] p. 3, lines 18-19; Affidavit of Elizabeth Ricci, R. 10, lines 14-15.] Construction of the dwelling was not sponsored, funded or supervised by the federal government. [T. 86, lines 12-16; T. 125, lines 10-13; Affidavit of George Ricci, R. 2, lines 9-12; Affidavit of Elizabeth Ricci, R. 9, lines 17-20.] Excluding their own labor, Petitioner and her husband spent $4,000 for materials in constructing the house. [Affidavit of Elizabeth Ricci, R. 10, lines 17-20.]

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[3]The trust exists pursuant to the provisions of the Mission Indian Relief Act of January 12, 1891, 26 Stat. 712.

[4]Pre-trial Stipulation as to Issues of Fact and Law, filed June 15, 1971 [Docket, R. 415]. The stipulation was not transmitted to the Court of Appeals as part of the record on appeal though designated for transmission. [R. 402.]

No application for the building permit was made to the County of Riverside as required by the Building Code.[5] [Stipulation, p. 3, lines 28-30.]

On April 16, 1971, when construction of the Petitioner's dwelling was almost complete, the fact that Petitioner was building a structure without a permit was brought to the attention of officials of Riverside County when the structure was discovered by Respondent Allee. [Affidavit of William O. Allee, R. 58, lines 27-31.] A notice was posted at the construction site ordering a cessation of construction under threat of criminal prosecution, for noncompliance with the Building Code. [Affidavit of William O. Allee, R. 58, line 32 to R. 59, line 3; Affidavit of George Ricci, Exhibit B, R. 7.]

On May 7, 1971, four days prior to filing the action in the District Court, Petitioner's husband was told that unless he obtained a building permit he would be criminally prosecuted. [Affidavit of George Ricci, R. 3, line 31, to R. 4, line 1; Affidavit of William O. Allee, R. 60, lines 4-9.]

In addition to failing to obtain a building permit, Petitioner failed to comply with the construction requirements of the Building Code.[6] Respondent Allee testified as to the provisions of the Uniform Plumbing

---

[5]Riverside County Ordinance No. 457, §4, incorporates pursuant to authority given in Sections 50022.1 to 50022.8 of the California Government Code, certain provisions of the Uniform Building Code, Vol. 1 (1970 ed.) [Exhibit D]. The requirement for a building permit is found in Section 301 of the Uniform Building Code.

[6]Riverside County Ordinance No. 457 incorporates, pursuant to authority given in Sections 50022.1 to 50022.8 of the California Government Code, certain of the provisions of the Uniform Plumbing Code (1970 ed.) [Exhibit E.]

Code (1970 ed.) violated by Petitioner in constructing the dwelling:

> 1. Violation of §§401 and 503(a) in that the waste line and risers in the bathroom and the kitchen installed in the cement floor were constructed of galvanized pipe.
>
> 2. Violation of §1008(c) in that the domestic water lines installed in or under the cement slab were galvanized and not given a suitable protective coating.
>
> 3. A violation of §315(a) in that there was no protective material applied to the piping where it passed through the cement slab. [R. 59, lines 21-31.]

One of these code violations was acknowledged by Petitioner's expert. [Affidavit of Wally Niewadomski, R. 147, line 26, to R. 148, line 1.]

The failure to apply a protective coating to the domestic water lines in and under the cement slab will cause the pipe to corrode in from 5 years to 20 years. [Affidavit of LeRoy Bovey, R. 142, lines 19-21; Exhibit H; Affidavit of Wally Niewadomski, R. 148, lines 5-8.] The health implications of a piping failure due to external corrosion was testified to Kenneth A. Timm, the Technical Advisor to the International Association of Plumbing and Mechanical Officials, the organization that compiled the Uniform Plumbing Code:

> . . . A leak in a water line under or in a slab of a structure caused by corrosion would constitute a cross-connection and as such could contaminate not only the inhabitants of the structure, but other homes that had a common water supply as well as cause a structural failure due to soil instability.

A failure of the water piping system unless detected soon enough could cause a structural failure to the building by affecting the stability of the soil. A failure of the damage, waste and vent system could affect the health of the inhabitants by allowing sewage gas to enter the building. [R. 63, line 29, to R. 64, line 6.]

The judgment of the United States District Court, Honorable E. Avery Crary, Judge presiding, was entered September 9, 1971. [Docket, R. 416.] The judgment in material part reads:

* * *

1. That Defendants have jurisdiction over the allotment of Elizabeth Ricci, and the Pechanga Indian Reservation to enforce Riverside County Ordinance No. 457, regulating construction, even though the said allotment and the Pechanga Indian Reservation are owned in trust by the United States of America.

2. That a permanent injunction shall issue restraining Defendants, and each of them, from requiring Plaintiff Ricci, her agents or employees, to obtain a building permit for the continued construction of the existing dwelling on her trust allotment in the Pechanga Indian Reservation.

* * *

## Argument.

### The Appeal of a Judgment Restraining Enforcement of a Portion of an Ordinance Does Not Become Moot by Reason of Respondents' Failure to Enforce Other Ordinance Provisions Pending Appeal.

Respondents support Petitioner's application for a Writ of Certiorari. Although two issues are raised by the Petition for Writ of Certiorari, Respondents can add nothing to the argument of Petitioners with respect to the question of subject matter jurisdiction of the District Court. The following comments are concerned with the questions of whether justiciable controversy existed on appeal.

The question of whether or not this action presents an "actual controversy" under Article III of the Constitution and the Federal Declaratory Judgment Act, 28 U.S.C. §2201, was first raised on appeal by the United States in its brief *amicus curiae*. The United States argued that Petitioner's "immediate grievance" related to her ability to construct her house "free of county control", and because the District Court restrained Respondents from requiring Petitioner to obtain a building permit ". . . the question of Riverside County's powers to regulate other construction on Elizabeth Ricci's trust allotment is 'purely artificial and hypothetical' on the present record, and, therefore, moot in this case at this time." [Brief of United States as *Amicus Curiae*, p. 4.]

The Court of Appeals, quoting from *California v. San Pablo & T. R. R.*, 149 U.S. 308 (1893), dismissed the appeal as moot based upon the argument of *amicus* and for the further reason that Respondents had not undertaken any action against Peti-

tioner for violation of the Building Code while the appeal was pending.

> More than three years have gone by, and we have not been advised that any prosecution has been instituted by the County against Mrs. Ricci for any violations of the Building Code. We hold that whatever threat there was of prosecution because of other possible violations of the Building Code does not create a substantial controversy of sufficient immediacy and reality to warrant consideration of that part of the judgment below declaring the Riverside County Building Code applied to the Plaintiff and the Pechanga Indian Reservation. See our discussion in *Rincon, supra,* pp. 5-6. Mrs. Ricci's appeal, therefore, is dismissed as moot. Having arrived at that conclusion, "we are precluded from considering any other issues presented for review" (Blackmun, J., concurring in *O'Shea v. Littleton, supra,* ..... U.S. at ....., 94 S. Ct. at 680. (495 F.2d at 7].)

The conclusion of the Court of Appeals can be sustained only if Petitioner became "free of county control" by being relieved of the requirement of obtaining a building permit, and if a declaratory judgment upholding a County ordinance becomes moot if action to enforce the ordinance is not taken during pendency of an appeal of the judgment.

The Building Code of Riverside County requires persons constructing a structure of the type the Petitioner constructed, to obtain a building permit and meet certain standards in terms of materials and methods to be used in construction. Petitioner sought an injunction against enforcement of the entire Building

Code against her and her dwelling, and a declaration as to the Respondents' jurisdiction to apply the terms of the Building Code within the Pechanga Indian Reservation. [R. 43, lines 15-25.] Contrary to the characterization in the majority opinion of the Court of Appeals [495 F.2d at 6.], the Petitioner's complaint for injunctive relief was not limited to restraining Respondents from enforcing only that portion of the Building Code requiring a building permit. The complaint specifically alleged that Petitioner had neither the money nor the time to make the structural changes to her dwelling in order to comply with the Building Code, prior to the date she was to vacate her old home and move into the structure under construction. [Complaint, R. 41, lines 6-19.]

The judgment of the District Court restrained Respondents from enforcing against Petitioner only that portion of the Building Code requiring a building permit and only as to the then current construction of the dwelling. The District Court did not restrain enforcement of any other part of the Building Code, including the construction requirements, against Petitioner, or her dwelling, or enforcement of the permit requirement against any possible future construction work on her dwelling. Therefore Petitioner did not gain the full measure of "freedom from county control" she requested. Consistent with the judgment of the District Court, Respondents have the options of bringing a civil action to compel Petitioner to vacate the premises or comply with the construction standards of the Building Code; a criminal action for violation of the construction standards (Riverside County, California, Ordinance No. 457, §9 [Exhibit A]); or waiting until portions of the plumbing system corrode and then mov-

ing to abate the structure as a health hazard. *City of Bakersfield v. Miller*, 64 Cal.2d 93, 48 Cal.Rptr. 889, 410 P.2d 393 (1966); Riverside County, California, Ordinance No. 457, §4(a) and (2.1) [Exhibit A].

The Court of Appeals also relied upon Respondents' inaction in prosecuting Petitioner after entry of the District Court judgment, for violation of the Building Code standards of construction, in holding that the appeal had become moot. In reaching this conclusion, the Court of Appeals cited [495 F.2d at 7] and apparently relied upon the authorities discussed in the portion of its opinion related to the companion case of *Rincon Band of Mission Indians v. County of San Diego*. These authorities relate to the requirement of substantiality, immediacy, and reality of a threat of enforcement necessary to maintain an action for declaratory relief on the question of the legality of a statute.

There would appear to be no basis in the record to question the substantiality, immediacy, and reality of the written and oral threats given Petition and her husband of prosecution for violation of the Building Code. [Affidavit of William O. Allee, R. 58 to R. 60; Affidavit of George Ricci, R. 3 to R. 4 and Exhibit B, R. 7.] See *Steffel v. Thompson*, .... U.S. ...., 94 S.Ct. 1209 (1974). Unless the Court of Appeals is adding a further requirement that a threat to enforce a statute specify the precise grounds of alleged violation in order to be substantial, immediate and real, it would appear that the test of justiciability announced in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941), has been met.

An actual controversy must appear at every stage of review, however, not merely at the time the complaint

is filed. *Roe v. Wade*, 410 U.S. 113, 125 (1973); *S. E. C. v. Medical Comm. for Human Rights*, 404 U.S. 403 (1972). The Court of Appeals apparently concluded that the failure of Respondents to take enforcement action agaist Petitioner during the pendency of the appeal, removed or vitiated the earlier threat to enforce the provisions of the Building Code.

Ordinarily, voluntary cessation of conduct complained of will not render a case moot. In *United States v. Concentrated Phosphate Export Association*, 393 U.S. 199 (1968), this Court held that on the particular facts of the case an action to enjoin alleged violation of the Sherman Act by a trade association was not technically moot merely because during the course of litigation the association was dissolved and a new federal agency regulation made it uneconomical for an association to continue. The Court's opinion states:

> The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave "[t]he defendant . . . free to return to his old ways." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953); see *e.g.*, *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897). A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. But here we have only appellees' own statement that it would be uneconomical for them to engage in any further joint operations. Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have

> held rests upon those in appellees' shoes. *United States v. W. T. Grant Co.*, 345 U.S. at 633. . . . [393 U.S. at 203.]

There are no "subsequent events", other than Respondents' inaction, noted in the opinion of the Court of Appeals, that make it absolutely clear that Respondents will not continue to enforce the Building Code against Petitioner and within the Pechanga Indian Reservation. Factually, the issue must arise again. There is no question that a portion of Petitioner's plumbing system will corrode sometime in the future. At that time she will have to obtain a building permit to effect the needed repairs [Uniform Plumbing Code (1970 ed.) §1.8] or forego the repairs and await abatement proceedings by the Respondents.

**Conclusion.**

Petitioner's Petition for Writ of Certiorari should be granted.

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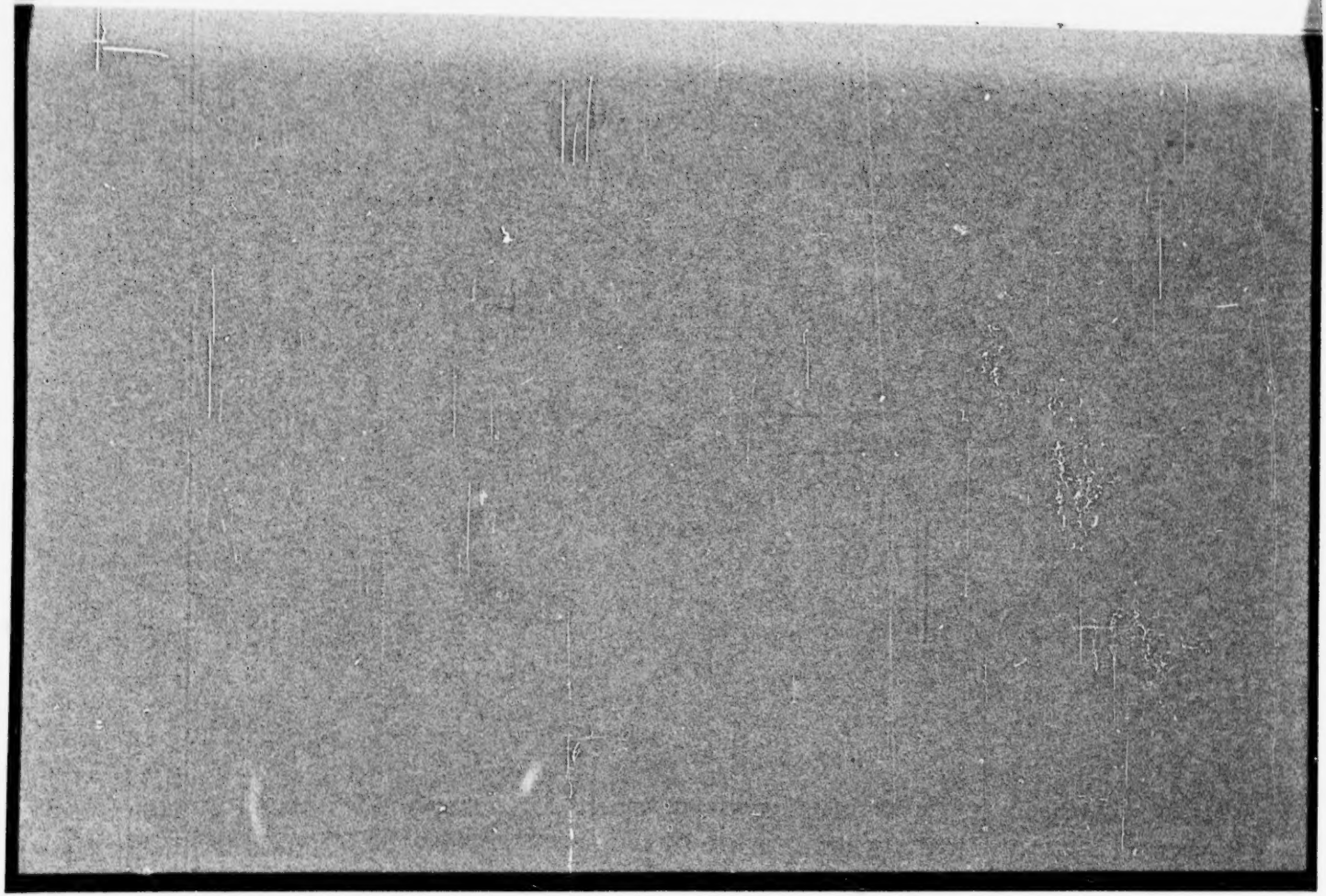

## APPENDIX A.

**Memorandum for Use in Preparation of Proposed Findings of Fact and Conclusions of Law, and Judgment.**

United States District Court, Central District of California.

Elizabeth Ricci, Plaintiff, vs. County of Riverside; R. C. Smith, Director, Department of Building and Safety; and William O. Allee, General Building Inspector for the County of Riverside, Defendants. No. 71-1134-EC.

United States of America, Plaintiff, vs. County of Riverside; R. C. Smith, Director of the Riverside County Department of Building and Safety; and William O. Allee, General Building Inspector for the County of Riverside, Defendants. No. 71-1297-EC.

Filed: Aug. 3, 1971.

The first of the above entitled actions was filed on May 11, 1971. The Government filed its suit, a companion case, on May 28, 1971, and the two cases have been consolidated for trial.

Both suits seek to enjoin the enforcement of Riverside County Ordinance No. 457 (Deft's Ex. A) on Trust Land in the Pechanga Indian Reservation, which has been allotted to the plaintiff Ricci, and on Indian Trust Land generally.

By stipulation of all parties, the only evidence adduced at the trial of the case in chief was by way of affidavits. It was further agreed that the exhibits to the pleadings and affidavits are to be deemed exhibits in

evidence, in addition to the exhibits introduced at the time of trial. The testimony taken at the hearing of the motion for preliminary injunction is also evidence in the cases considered herein.

*RICCI vs. COUNTY OF RIVERSIDE, ET AL.*

Plaintiff Ricci seeks an injunction against the County of Riverside from enforcement of its Ordinance 457, Uniform Building Code, (Deft's Ex. A) on plaintiff's allotted Indian Trust located on the Pechanga Indian Reservation in Riverside County. The Pechanga Tribe is not a chartered Federal corporation with powers to manage the affairs of its members. A dwelling being constructed by plaintiff and her husband on her allotted property was nearly completed when she was notified by Riverside County authorities of the requirements of Riverside County Ordinance No. 457, adopted in 1959, that a permit be obtained for such construction and that she must obtain such permit or face criminal prosecution.

It is conceded by Plaintiff that the house does not comply with the County Building Code, a part of Ordinance 457, but is urged that neither the Ordinance nor the County Building Code may be enforced on Indian Trust Property. Permission to construct the dwelling was granted by the Pechanga Indian Tribal Council. The plaintiff also relied on a letter to Mr. Frank McGee, an Indian neighbor of plaintiff, signed by Mr. R. C. Hampton as Senior Building Inspector of Riverside County Department of Building and Safety, which stated that buildings constructed on Indian reservations were exempt from building permit requirements (Ex. A to Affidavit of George Ricci), and two letter opinions, one of the Solicitor, Department of Interior,

and one of the Regional Solicitor, both written in 1969 (Exs. C and D to the Complaint).

The issues presented in the Ricci case are: (1) Whether Riverside County Ordinance No. 457 is enforceable on Indian Trust Land in the Pechanga Indian Reservation and (2) Assuming the Ordinance to be enforceable on the Trust Land, whether the County of Riverside may, in the circumstances, enforce the Ordinance against plaintiff.

Riverside County urges that the Ordinance is a police power regulation related to the protection of public health and safety and was adopted under the authority of Article XI, Section 7, of the California Constitution:

> "A County or City may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

Ordinance 457 adopts certain provisions of uniform codes, as specified therein, including building, plumbing and electrical codes, as authorized by Sections 50022.1 to 50022.8 of the California Government Code.

The counties in California are required to comply with the State legislation on health and safety as provided in California Health and Safety Code, Section 17958.

One of the defects in the plaintiff's dwelling is the failure to comply with the plumbing requirements in Ordinance 457.

*Ordinance 457 as it Relates to Public Law 280*

Public Law 280 was enacted August 15, 1953, c. 505 § 4, 67 Stat. 589, and amended in 1954 and

1958. It is codified in Title 18 U.S.C. § 1162[1] and Title 28 U.S.C. § 1360.[2] The law removed the Indians in certain states, including California, from the exclusive jurisdiction of the Federal Government (Department of Interior) and extended to Indian Reservations

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[1]§1162. State jurisdiction over offenses committed by or against Indians in the Indian country.

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

| State or Territory of | Indian country affected |
|---|---|
| * * * | * * * |
| California | All Indian country within the State |
| * * * | * * * |

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section. Added Aug. 15, 1953, c. 505, § 2, 67 Stat. 588, and amended Aug. 24, 1954, c. 910, § 1, 68 Stat. 795; Aug. 8, 1958, Pub.L. 85-615, § 1, 72 Stat. 545.

[2]§1360. State civil jurisdiction in actions to which Indians are parties.

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Terri-

and the Indian allottees of Indian Trust Lands, the substantive civil laws of the respective states insofar as their laws were of general application to private persons or private property. With certain limitations, the Act also extended the laws of the specified states to real and personal property belonging to an Indian or Indian Tribe that was held in trust by the United States.

In passing Public Law 280, Congress observed that the extension of State laws to Indians and Indian reservations was "deemed desirable." In the legislative history, as reported in H. Rept. No. 848, 83rd Cong.,

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tory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

| State or Territory of | Indian country affected |
|---|---|
| * * * | * * * |
| California | All Indian country within the State |
| * * * | * * * |

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section. Added Aug. 15, 1953, c. 505, § 4, 67 Stat. 589, amended Aug. 24, 1954, c. 910, § 2, 68 Stat. 795; Aug. 8, 1958, Pub.L. 85-615, §2, 72 Stat. 545.

1st Sess. (1953), adopted verbatim in S. Rept. No. 699, 83rd Cong., 1st Sess. (1953), the following comment appears:

> "Similarly, the Indians of several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian country within their borders. Permitting the State courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective States insofar as those laws are of general application to private persons or private property, is deemed desirable."

Section 1360 of Title 28, U.S.C., as noted above, codifies Public Law 280 with respect to State civil jurisdiction.

Paragraph (a) of the Section concerns State jurisdiction of civil actions to which Indians are parties and the applicability of the civil laws of such State that are of general application to private persons and private property within Indian country.

Paragraph (b) of Section 1360 provides, in part, that nothing in the Section shall authorize the alienation or encumbrance of any real or personal property belonging to any Indian or Indian Tribes *that is held in trust* by the United States "* * * or shall authorize regulation of the use of *such property* in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; * * *." [Emphasis added.]

Paragraph (c) of the Section provides that Tribal ordinances or customs of an Indian Tribe in the exercise of any authority it may possess shall "* * * if not

inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this Section."

Section 1162 of Title 18, U.S.C., codifies Public Law 280 with respect to jurisdiction of criminal offenses committed by or against Indians in Indian country within the State and the applicability of criminal laws of such State within such Indian country.

County Ordinance 457 is a law of the State of California of general application within the meaning of the statutes. Article XI, Section 7, California Constitution, supra; Restatement of the Law—Conflicts of Law, Section 2(b).[3]

Applying the provisions of the statutes to this case, two questions are to be answered: (a) Does Riverside County Ordinance No. 457 impose an *encumbrance* on the plaintiff's real property? (b) Does the Ordinance constitute a regulation of the *use* of such property in a manner inconsistent with any Federal treaty or statute?

The plaintiff relies in chief on an opinion of the Solicitor, Department of Interior, dated February 7, 1969, and on an opinion of the Regional Solicitor dated March 27, 1969 (Exs. C and D to Complaint), together with *Snohomish County vs. Seattle Disposal Co.*, 70 Wash. 2d 668, 425 P.2d 22 (1967), Cert. den. 389 U.S. 1016 (1967); and *Warren Trading Post*

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[3]The Restatement of Conflicts, § 2b:

The body of law of a state is not necessarily applicable equally to all persons or places within the state. Thus, different classes of persons or different localities may be governed by different laws, or local subdivisions of the state may be allowed by the state to make laws applicable in some particulars within their own boundaries. All such laws, however, form a portion of the law of the state.

*Company vs. Arizona Tax Commission,* 380 U.S. 685, (1965). Violation of the due process clause of the United States Constitution is also alleged by plaintiff based on the asserted vagueness of the statute and the arbitrary interference with plaintiff's right by the enforcement of Ordinance 457.

The opinions of the Solicitor, Department of Interior, and the Regional Solicitor, written after Public Law 280 became effective, are stated in two letters dated February 7, 1969, and March 27, 1969, supra. These letter opinions concern California health and sanitation laws (Exhibit C) and California grazing and fencing laws (Exhibit D). The Solicitor discusses pertinent cases and statutes, including Section 231, Title 25, U.S.C., and states the position of the Department of the Interior to be as follows:

> "Generally, it is the position of this Department that Public Law 280 invests the states, which were granted or have assumed jurisdiction thereunder, with civil and criminal jurisdiction over the persons and private (non-trust) property of Indians within the Indian country." [Exhibit C, page 1.]

He relies, in chief, on *Snohomish County vs. Seattle Disposal Co.,* 425 P.2d 22 (Wash. 1967), supra; and Dept. of the Interior Regulation, 25 C.F.R. 1.4, and in concluding his letter of February 7, 1969, he says:

> "Our conclusion is that Public Law 280 invests the State of California with jurisdiction to enforce its health and sanitation laws and regulations against the person of Indians in the Indian country

> but does not authorize the State, directly or indirectly, to enforce such laws against property held in trust by the United States for the benefit of Indians."

The plaintiff Ricci and the Government agree that Section 1.4, 25 C.F.R., is not applicable to the within cases by reason of the fact it concerns *leased* Indian Trust Land.

In the *Snohomish* case, supra, the defendant Seattle Disposal Company leased allotted Indian land, one parcel of which was Trust Land, for use as a sanitary land-fill garbage and refuse disposal site. The lease was authorized by the Tulalip Indian Tribes (Tribes) under their Tribal Ordinance No. 29. The Tribes were organized as a Federal corporation pursuant to the Indian Reorganization Act, 25 U.S.C. § 477.

Under Snohomish County zoning Ordinance No. 7, a conditional use permit was required to carry on garbage disposal operations except on land exempt from county regulation.

The Tribes, as Intervenor, and the defendant Company moved for summary judgment on the grounds the Court lacked jurisdiction of the subject matter. The Court granted the motion, holding that the State and its governmental agencies had no jurisdiction over *use* of the land in question and the zoning Ordinance No. 7 did constitute an *encumbrance* in violation of 28 U.S.C. 1360, and that the Tribes had the power, to the exclusion of the county or state, to regulate the use of the land in question and had done so by adopting Ordi-

nance 29. The County appealed and the Supreme Court of Washington held that the Tribes and property involved were not within the grant of State jurisdiction as provided in 28 U.S.C. 1360. [Pp. 25-26, opinion.] As authority for holding the zoning ordinance to be an *encumbrance*, the Washington court states, at page 26 of its opinion:

> "This court has said in the past that any 'burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee' constitutes an encumbrance. Hebb v. Severson, 32 Wash. 2d 159, 167, 201 P.2d 156, 160 (1948). The application of the zoning ordinance to prohibit or limit the use of this land for commercial purposes certainly could be considered to diminish its value."

Judge Hale, in dissenting, urges that the zoning laws are not encumbrances but rather an exercise of police power to foster public welfare, health and safety. The Judge also points out that although zoning does impair the use of the land that zoning laws have never been held to be an encumbrance on real estate, as that term is contemplated under applicable law, but are exercised as police power of the governing authority. He cites and discusses several authorities on this point at page 28 of the opinion.

It appears to this Court that Ordinance 457 here involved does not constitute an encumbrance on the land involved even within the definition of that term as stated by the majority in the Snohomish case, since building ordinances are not generally considered to be a burden upon land depreciative of its value, such as a lien, easement, or servitude. *Lohmeyer vs. Bower*, 227 P.2d 102 (Kan. 1951).

Plaintiff's reliance on *Warren Trading Post Co. vs. Arizona Tax Commissioner*, 380 U.S. 685 (1965), does not appear to be well founded. It is to be noted that the State of Arizona is not one of those listed in Public Law 280.

The *Warren* case involved the right of Arizona to levy income tax on the appellant who was the operator of a Trading Post on the Navajo Indian Reservation under license from the Commission of Indian Affairs. The United States Supreme Court held that since Congress had broadly occupied the field of trading with Indians on reservations by all-inclusive regulations and statutes the State could not impose additional burden on the Indians or traders.

In marked contrast, Congress has not occupied the field involved in the case at bar by prescribing any legislation providing for the regulation of building construction on allotted lands. On the contrary, by Public Law 280, Congress has, with specified limitations, made specific legislative provisions for the exercise of civil as well as criminal jurisdiction by California over Indians and their property, *including trust lands.*

The California District Court of Appeal, in *People vs. Rhoades*, 12 C.A. 3rd 720, 90 Cal. Rptr. 794, considered the enforcement of Section 4291 of the California Public Resources Code which required the maintenance of a firebreak around buildings under specified conditions. Section 4021 of California Public Resources Code makes the violation of Section 4291, supra, a misdemeanor. Defendant, an Indian, was convicted in Justice Court for violation of Section 4021.

The premises involved were Indian Trust Lands. The District Court of Appeal, in reversing the judg-

ment of the Superior Court, which Court had reversed the conviction of the defendant Rhoades in the Justice Court, held that the State statute did not constitute an encumbrance on the land involved within the provisions of Public Law 280 (18 U.S.C. 1162) and that Section 4291 was a valid exercise of police power by the State. The Court discusses, in its opinion, the *Snohomish* case, supra, at some length (p. 797), and in ruling that Section 4291 did not constitute an encumbrance on the defendant's land under the definition of the Court in the *Snohomish* case, stated:

> "As we view it, it would not be a burden upon Rhoades' land 'depreciative of its value' to require that it be so maintained as not to be a hazard to forest lands in general and to Rhoades' lands in particular. We prefer the more common sense approach of dissenting Judge Hale and the other dissenting judges in Snohomish. The dissenting opinion says (on pp. 27-28): 'The broad general meaning employed by the majority * * * is not called for by the statute. The term "encumbrance" should be given its more * * * precise meaning—one denoting a burden on the land and affecting the title thereto or one impairing the power of alienation such as a mortgage, lien, easement, lease, or other disability to fee ownership.' In short, this court takes the position that by 'encumbrance' Congress intended to protect the Indian against his own profligacy—against those who throughout history have exploited the Indian. And we direct attention to the fact that in Public Law 280 the word 'encumbrance' (in the restrictive sentence referred to above) is used in the same series as the word 'alienation.' "

Insofar as concerns the issue of whether Ordinance 457 constitutes an encumbrance on plaintiff's land, this Court concludes that Congress intended no expanded definition of the meaning of the word as used in Public Law 280 beyond its usual interpretation, that is, a burden on the land which may impair the alienability of the fee, such as a mortgage, lien, or easement. *People vs. Rhoades,* supra; *Rincon Band of Mission Indians vs. County of San Diego,* 324 F. Supp. 371, 376, U.S.D.C. S.D. Cal., March 17, 1971. The Rincon case, supra, involved a San Diego County ordinance prohibiting the letting or use of Rincon Indian Reservation land for gambling purposes. In discussing "encumbrance", the Court said:

> "Whatever the term encumbrance denotes in Washington law, this court finds no warrant for expanding the definition of encumbrance as that term appears in Public Law 280 beyond its usual application indicating a burden on the land imposed by third persons which may impair alienability of the fee, such as a mortgage, lien, or easement. See Snohomish County v. Seattle Disposal Company, 70 Wash.2d 668, 674, 425 P.2d 22, 28 (1967) (Dissenting Opinion). Cf. Kirkwood v. Arenas, 243 F.2d 863, 867 (9th Cir. 1957).
>
> "[6, 7] The use of the word encumbrance in series with 'alienation' and 'taxation' indicates that Congress intended by these three words to protect the Indian from himself and swindlers, to prevent the taking of his lands by artifice or by law. Compare this language with similar terms employed for the same purpose in the Mission Indian Relief Act and the General Allotment Act,

discussed in Kirkwood v. Arenas, *supra* at 866. Later in the same statute it is provided that nothing in the section 'shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto.' 18 U.S.C. § 1162 (b). If all state laws regulating land use were made inapplicable by the earlier language describing encumbrances, then this language would be totally unneeded. In construing a statute, courts whenever possible avoid a construction which renders part of the statute superfluous. Consolidated Flower Shipments, Inc., Bay Area v. Civil Aeronautics Board, 205 F.2d 449 (9th Cir. 1953)."

Building ordinances, although they may be said to technically interfere with the *use* of land, have not been deemed to be encumbrances on the land and are lawful means of fostering the general welfare and contributing to the public health and safety under the police power. The provisions of Section 1360(b), Title 28, U.S.C., supra, preclude the laws of a State from the "regulation of the use" of the property here involved "in a manner inconsistent with any Federal * * * statute or with any regulation made pursuant thereto; * * *." Assuming, arguendo, that Ordinance 457 constitutes a technical regulation of the use of plaintiff's land, the Court concludes it is not such a regulation of use contemplated by the statute or intended by Congress, and, furthermore, not a regulation of use inconsistent with any Federal statute or *valid* regulation made pursuant thereto.

By virtue of the authority vested in the State of California by Public Law 280, State law may regulate the

*use* of Indian Trust Property if such regulation is not inconsistent with, in our case, a Federal statute or valid regulation issued pursuant thereto.

The United States, in its case, cites Federal acts and statutes, discussed infra, which, it contends, are inconsistent with Ordinance 457.

Although the Government may, of course, at any time, by way of statute, ordinance, or otherwise preempt the field of regulating the construction of buildings on Indian reservations, Congress has not seen fit to do so other than in certain Government projects financed and controlled through Government agencies referred to hereinafter. As noted above, Congress has, on the contrary, by Public Law 280, vested certain states with limited jurisdiction in the area of the law which includes this field generally. Until Congress sees fit to enact legislation which would preempt the field or the field be preempted by a valid regulation issued pursuant to a Federal statute, the Court concludes that the Government has not preempted the field and that Ordinance 457 is enforceable on the Pechanga Indian Reservation, including the Trust Land allotted to plaintiff herein, unless the County is, in the circumstances, precluded from enforcing the Ordinance as to the particular dwelling now completed on plaintiff's property by reason of her rights to due process.

On the issue of preemption, the United States Supreme Court, in *Head vs. New Mexico Board of Examiners* in Optometry, 374 U.S. 424 (1963), states:

> "In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity

> of this claim cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation under the Federal Communications Act.[6] [T]he "question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case." Statements concerning the "exclusive jurisdiction" of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive.' *California v. Zook*, 336 U.S. 725, 731. *Kelly v. Washington*, 302 U.S. 1, 10-13. In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that state statutes, otherwise valid, must be upheld unless there is found 'such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field.' *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141."

Concerning plaintiff's right to due process of law and the question of whether those rights have been violated in the circumstances, the Court concludes that plaintiff Ricci is a ward of the Government and that she made every reasonable effort to build her home in accordance with the laws and regulations she had reason to believe, from sources of information normally available to her, were applicable. She had good reason to conclude from the information at hand, on which she had the right to rely, that she was not required to obtain a County building permit to build her house, and the Court concludes she may not be held to have

reasonably anticipated the Ordinance applied to her home on Indian Trust Land.

The plaintiff's house was nearly completed when the County authorities advised her of the need for obtaining a building permit under Ordinance 457. This was the first time the County had sought to enforce the 18 year old Ordinance on the Pechanga Reservation.

Having in mind all of the facts and circumstances as disclosed by the evidence introduced at the hearing on the motion for preliminary injunction and the many affidavits and exhibits offered by stipulation at the trial in chief, the Court concludes that the plaintiff's constitutional rights to due process were violated by the County of Riverside in requiring that she obtain a building permit for her nearly completed home.

Without going into detail, suffice it to say, there a great deal of confusion and conflicting opinions, as indicated by the evidence, on the part of Federal, State and County authorities, and the Pechanga Tribe, as to the proper interpretation of Public Law 280 with respect to the necessity of Indians occupying Trust Property to conform to certain County building ordinances.

*UNITED STATES vs. COUNTY OF RIVERSIDE, et al.*

The United States, by its action No. 71-1297-EC, also seeks an injunction against the enforcement of the Riverside Ordinance No. 457. The Government states the issue to be "whether Ordinance 457 is applicable to the Trust Lands in the Pechanga Indian Reservation."

The Government asserts that Ordinance 457 is in violation of Public Law 280 by reason of the Ordi-

nance being inconsistent with the following Federal acts and statutes:

(1) 1891 Mission Indian Relief Act.

(2) Title 42, U.S.C. §§ 2003 and 2004(a).

(3) Title 42, U.S.C. § 1589c.

The other contentions of the United States involving restrictions on the use and encumbrance of Indian Trust Properties conform substantially to the contentions of the plaintiff Ricci.

Referring to the Mission Indian Relief Act of 1891, it is to be noted that this Act was enacted long before Public Law 280 and that Public Law 280 obviously extends the laws of California, with certain limitation, to Indians and their property, including Trust Lands, and to the extent State laws are so extended, which is substantial, Public Law 280 would serve to amend prior declarations by Congress of Government authority in this field.

The case of *United States vs. Rickert,* 188 U.S. 432 (1903), so strongly relied on by plaintiffs in their discussion of "encumbrance", does not preclude the enforcement of Ordinance 457. The Supreme Court, in 1903, held that States could not levy taxes on lands allotted to Indians, nor the permanent improvements thereon, nor on personal property used by the Indians and obtained from the United States. To the same effect is *Kirkwood vs. Arenas,* 243 F.2d 863 (9 C.A. 1957).

Not only does the right to tax include the right to confiscate for nonpayment thereof, obviously an encumbrance, but Public Law 280 (Title 28, U.S.C. § 1360(b)) specifically excludes the states' right to tax any Indian Trust Property or personal property.

Referring to Sections 2003 and 2004(a), Title 42, U.S.C., supra, these sections do not appear to be inconsistent with Ordinance 457 nor do they preempt the field of required standards for the building of dwellings on Indian Trust Property.

The plaintiffs agree that the Secretary of Health, Education and Welfare (HEW) has *not* issued any regulations within the authority vested by the provisions of Section 2003.

Section 2004(a) refers to the construction of sanitation facilities by the Surgeon General. This Section concerns sanitation facilities including water supplies, sewage and waste disposal facilities, with appurtenances and fixtures for the use of same by Indian homes.

The affidavit of Raymond E. Johnson, Senior Sanitation Engineer, Indian Health Service, Riverside Field Office of the United States Department of HEW, concerns Government projects under Section 2004(a), supra, and he states, among other things, on page 3 of his affidavit that the sewage facilities which will be installed by the Government on the Pechanga Reservation "* * * will conform to the standards of local codes." The defendants agree that Ordinance 457 is in no wise controlling as to Government projects on Indian Reservations.

Mr. Marcoe, Supervisory Construction Representative for the Riverside Field Office of the United States Department of the Interior, Bureau of Indian Affairs, states in his affidavit that he is in charge of housing projects undertaken by the Bureau of Indian Affairs in conjunction with other Federal agencies, such as the Department of Housing and Urban Development (HUD). He oversees projects on Indian Reservations

in California which have been authorized under the Housing Improvement Program (HIP) of the Bureau of Indian Affairs. These are Government financed and controlled projects and, of course, are not subject to State laws.

Every effort should be made to improve the lot of the Indian, including his housing, within the framework of the laws enacted by Congress for his benefit. However, it does not appear that it would be to the Indian's best interest, or within the contemplation of Congress, to allow the Indian Trust Property to be developed in a manner which would result in unsanitary or unhealthy conditions. In the absence of Government control for housing construction generally, such undesirable conditions would readily develop in the construction of dwellings not a part of a Government project.

Neither plaintiff asserts that Ordinance 457 is unreasonable in its requirements, but only that it is not enforceable.

Title 42, U.S.C. § 1589(c),[4] supra, cited by plaintiff, authorizes the Secretary of Interior to convey surplus housing to members of Indian Tribes in certain counties of California, free of charge.

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[4] § 1589c. Transfer of certain housing to Indians

Upon a certification by the Secretary of the Interior that any surplus housing, classified by the Administrator as demountable, in the area of San Diego, California, is needed to provide dwelling accommodations for members of a tribe of Indians in Riverside County or San Diego County or Imperial County, California, the Administrator is authorized, notwithstanding any other provision of law, to transfer and convey such housing without consideration to such tribe, the members thereof, or the Secretary of the Interior in trust therefor, as the Secretary may prescribe: *Provided*, That the term housing as used in this section shall not include land.

Oct. 14, 1940, c. 862, Title VI, § 613, as added Aug. 2, 1954, c. 649, Title VIII, § 805(3), 68 Stat. 645.

Mr. Leonard M. Hill, Area Director, Bureau of Indian Affairs, Sacramento, California, addressed a memorandum dated October 15, 1954 (Ex. A, Affidavit of Sullivan, filed June 29, 1971), to "Governing Bodies and Members of Indian Bands in San Diego, Riverside and Imperial Counties." The memorandum concerned Federal surplus housing made available to Indians in those counties and stated, among other things, that "under existing laws, the counties and states have authority to enforce, and have stated that they will enforce, applicable building codes on Indian lands the same as on non-Indian lands." [Page 1.] * * * "The plumbing work must be inspected to ensure that it meets the county code standards." [Page 3.] * * * "The counties have the authority and, it appears, the intention to enforce applicable building codes on Indian land." [Page 4.]

Federal funds were not available to assist in the moving or rebuilding of the surplus housing.

Title 25, U.S.C. § 231,[5] enacted in 1929, concerns the enforcement of State laws affecting health and education. That statute provides that "The Secretary of the Interior, under such rules and regulations as he

[5]§ 231. Enforcement of State laws affecting health and education; entry of State employees on Indian lands.

The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations or (2) to enforce the penalties of State compulsory school attendance laws against Indian children, and parents, or other persons in loco parentis except that this subparagraph (2) shall not apply to Indians of any tribe in which a duly constituted governing body exists until such body has adopted a resolution consenting to such application. Feb. 15, 1929 c. 216, 45 Stat. 1185; Aug. 9, 1946, c. 930, 60 Stat. 962.

may prescribe, shall permit agents * * * of any State to enter upon Indian tribal lands * * * for the purpose of making inspection of health * * * conditions and enforcing sanitation and quarantine regulations * * *." The statute was amended in 1946.

Direction of Indian affairs concerning sanitation facilities was transferred to the Surgeon General in 1954.

Plaintiff urges that the provision of Section 231 do not allow State entry on Indian lands without implementing rules and regulations by the Secretary.

The Supreme Court, in *Organized Village of Kake, et al. vs. Egan, Governor of Alaska,* 369 U.S. 60 (1962), in discussing the influence of State laws on Indian Reservations, stated:

> "Concurrently the influence of state law increased rather than decreased. As the result of a report making unfavorable comparisons between Indian Service activities and those of the States, Congress in 1929 authorized the States to enforce sanitation and quarantine laws on Indian reservations, to make inspections for health and educational purposes, and to enforce compulsory school attendance. 45 Stat. 1185, as amended, 25 U.S.C. § 231. * * *
>
> "In 1953 Congress granted to several States full civil and criminal jurisdiction over Indian reservations, consenting to the assumption of such jurisdiction by any additional States making adequate provision for this in the future. 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360. * * * Thus Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed i the time of Chief Justice Marshall." [Pp. 73-74.]

The opinion of the Washington Supreme Court in *Snohomish County vs. Seattle Disposal Co.*, 425 P.2d 22, supra, upon which the plaintiffs and the Solicitor rely so heavily, in construing Public Law 280, says:

> "* * * the State has, of course, been granted jurisdiction to inspect and regulate health, sanitation and related matters on Indian Tribal lands. 45 Stat. 1185, 25 U.S.C. 231 * * *." [Page 27.]

The authorities do not appear to indicate that Section 231 requires implementing regulations by the Secretary of the Interior. See also *Acosta vs. County of San Diego*, 126 Cal. App. 2d 455, 563; 272 P.2d 92 (1954).

For the reasons noted above the Court concludes that under the provisions of Public Law 280, as codified, the Riverside County Ordinance No. 457 is enforceable on Indian Trust Land located in that County, that the Ordinance does not impose an "encumbrance" on such land nor does it constitute a regulation of use of the property inconsistent with any Fedral statute or valid regulation made pursuant thereto, and that although the Government may preempt the field of controlling the standards required as to the construction of dwellings on Indian Reservations, it has not seen fit to establish standards for construction generally on Indian Reservations except as to Government sponsored, financed and controlled projects.

It does not appear from the statutes or the legislative history of the Act, as codified in 25 U.S.C. 231, supra, or otherwise, that Congress intended to preempt the entire field of regulating health and sanitation on Indian lands. Federal statutes and regulations in the subject area are not sufficient to preempt the field unless the

purpose to effect that result is clearly manifested. *Reid vs. Colorado,* 187 U.S. 137, 148 (1902); *United States vs. Hatahley,* 220 F.2d 666 (10 C.A. 1955), reversed on other grounds, 351 U.S. 173.

As to the plaintiff Ricci, the Court concludes that the county of Riverside may not enforce the said Ordinance insofar as requiring her to obtain a permit for the building of her home, which was nearly completed when demand was first made upon her to obtain such permit.

Defendants' counsel are requested to prepare, serve and lodge Findings of Fact and Conclusions of Law and Judgment, in conformity with Local Rule 7.

This memorandum is not to be deemed a final judgment.

DATED: August 3, 1971

/s/ E. Avery Crary
E. AVERY CRARY
United States District Judge